APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1853 August Term, 1996

(Argued: April 16, 1997 Decided Nov. 21, 1997)

Docket No. 97-6029

GENERAL MEDIA COMMUNICATIONS, INC.; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION; NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS; PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC.; RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.; VIDEO SOFTWARE DEALER ASSOCIATION,
Plaintiffs-Appellees,

v.

WILLIAM S. COHEN,
in his official capacity as Secretary of Defense;
DEPARTMENT OF DEFENSE,
Defendants-Appellants.

Before: WINTER, *Chief Judge*, CABRANES and PARKER, *Circuit Judges.*

JOSÉ A. CABRANES, *Circuit Judge*:

In this appeal, we address whether Congress exceeded its constitutional authority in banning the sale or rental of "sexually explicit materials" by military personnel acting in an official capacity, including the sale or rental of

such materials by "military exchanges."[1] The United States District Court for the Southern District of New York (Shira A. Scheindlin, *Judge*) enjoined enforcement of the Military Honor and Decency Act of 1996, 10 U.S.C. § 2489a (the "Act"), after concluding that it violates the Free Speech Clause of the First Amendment[2] and the Due Process Clause of the Fifth Amendment.[3] *General Media Communications, Inc. v. Perry*, 952 F. Supp. 1072 (S.D.N.Y. 1997).

Heeding the Supreme Court's admonition that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged," *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), we hold that Congress acted well within its constitutional authority to regulate official military conduct.

Congress has not banned sexually-explicit magazines and videos—soldiers and sailors may still buy them elsewhere, receive them by mail, and read or watch them; Congress has decided only that the military *itself* will not be in the business of selling or renting these items to servicemembers. The appellees, who include publishers and producers of sexually explicit materials, argue that

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[1] Military exchanges may include retail stores, garages, restaurants, beauty shops, laundry facilities, newsstands, storage facilities, and recreational facilities. The exchanges are authorized to sell toiletries, stationery, clothing, jewelry, housewares, sporting goods, and automotive products, in addition to books, periodicals, and audio and video tapes. Joint App. at 127, 133-45, *reproducing* DoD Directive 1330.9 (Dec. 15, 1986).

[2] The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

[3] The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

their free speech rights will be abridged if the military stops selling and renting their products. But military exchanges are not public streetcorners; they are not available for everyone to "speak" from their shelves. These stores are nonpublic forums in which the government may restrict the content of speech, so long as the restriction is reasonable and it does not discriminate among particular viewpoints. Congress has regulated the military's purchase and resale of materials constituting a particular subject matter—lascivious depictions of nudity including sexual or excretory activities or organs—not those reflecting particular viewpoints. This policy avoids the appearance that the military, by selling sexually explicit materials in military exchanges, endorses these materials. As such, the policy is a reasonable way for Congress to uphold the military's image and core values of honor, professionalism, and discipline. Because the Act reasonably furthers legitimate governmental interests in a nonpublic forum without engaging in viewpoint discrimination, it does not violate the Free Speech Clause of the First Amendment.

The Act also does not violate the Fifth Amendment. Congress has considerable leeway in drawing distinctions as it decides how to implement particular policies. Insofar as the Act does not violate the First Amendment, its definitions and distinctions need only be rationally related to legitimate governmental interests. It passes that test, and so does not violate the equal protection guarantee of the Fifth Amendment. The Act's terms and meaning are also sufficiently clear to give the appellees notice of what will no longer be sold in military exchanges, and so the Act is not unconstitutionally vague.

The Constitution does not, of course, stop at the gates of a military base. But within those gates, "the rights of [persons] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker v. Levy*, 417 U.S. 733, 744 (1974) (internal quotation marks and citations omitted). Con-

gress, acting under its authority to maintain and regulate the armed forces, may constitutionally place some restrictions on the speech that occurs under military command. The Military Honor and Decency Act of 1996 embodies such a set of constitutional restrictions. Accordingly, we vacate the judgment of the district court and remand with instructions to enter judgment for the appellants.

I.

The Military Honor and Decency Act became effective on December 22, 1996, and provides in pertinent part:

> (a) PROHIBITION OF SALE OR RENTAL.—The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.
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> (b) PROHIBITION OF OFFICIALLY PROVIDED SEXUALLY EXPLICIT MATERIAL.—A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person.
>
> (c) REGULATIONS.—The Secretary of Defense shall prescribe regulations to implement this section.
>
> (d) DEFINITIONS.—In this section:
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> (1) the term "sexually explicit material" means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

10 U.S.C. § 2489a. Pursuant to section 2489a(c), the Department of Defense issued a "directive-type memo-

randum"[4] implementing the Act that also became effective on December 22, 1996. This memorandum contains the following pertinent definitions:

1. *Material.* An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

2. *Sexually Explicit Material.* Material the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or ogans, in a lascivious way.

3. *Dominant Theme.* A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

4. *Lascivious.* Lewd and intended or designed to elicit a sexual response.

Joint App. at 63, *reproducing* DoD Directive-Type Memorandum, "Sale or Rental of Sexually Explicit Material on DoD Property" (Dec. 22, 1996). The memorandum also provides that "[m]aterial shall not be deemed sexually explicit because of any message or point of view expressed therein."

In addition, the memorandum establishes the "Resale Activities Board of Review" (the "Board"). The Board is obliged periodically to review material offered for sale or rental on military property to determine whether such material is sexually explicit. Any material that the Board finds to be "sexually explicit" according to the stated

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[4] A Department of Defense "Directive" is defined as a "broad DoD policy document containing what is required by legislation, the President, or the Secretary of Defense to initiate, govern, or regulate actions or conduct by the DoD." Joint App. at 70, *reproducing* DoD Directive at 5025.1-M, "DoD Directives System Procedures" (Aug. 15, 1994). A "Directive-Type Memorandum" is a document that, "because of time constraints, cannot be published in the DoD Directives System"; such a memorandum is later converted into a directive or instruction. *Id.*

terms of the memorandum is to be withdrawn from military retail outlets.

The district court found, and the parties do not dispute, that the Act bans only the sale or rental of sexually explicit material on military property. The Act does not restrict the possession of such material on military property, nor does it prohibit military personnel from sharing such material with their colleagues, so long as they do not sell or rent it. Additionally, military personnel may buy sexually explicit material off military property or order it through the mail. *See General Media*, 952 F. Supp. at 1075.

Appellee General Media Communications, Inc. ("GMC") publishes various periodicals, including *Penthouse*. The other appellees are various trade associations representing businesses engaged in the production, wholesale and retail distributions, and sale of periodicals, books, sound recordings, and home videos throughout the country.

Appellees brought suit in the district court in October 1996 seeking an injunction barring the enforcement of the Act and a declaratory judgment that the Act is unconstitutional. Appellees alleged, *inter alia*, that the Act infringes their rights to free speech and equal protection of the laws, in violation of the First and Fifth Amendments, and that the act is unconstitutionally vague, in violation of the Fifth Amendment. *See General Media*, 952 F. Supp. at 1075. On December 20, 1996, two days before the Act was to go into effect, the district court issued a temporary restraining order enjoining appellants from enforcing the Act until the court had decided appellees' motion for a preliminary injunction. Following parties' submissions of affidavits and declarations, the district court heard oral argument on December 31, 1996, and on January 13, 1997, the parties agreed to treat appellees' motion for a preliminary injunction as one for a permanent injunction. *Id.*; *see* Fed. R. Civ. P. 65(a)(2).

In an opinion and order dated January 22, 1997,[6] the district court granted appellees' request for injunctive relief, finding that the Act (i) infringed appellees' free speech rights in violation of the First Amendment; (ii) violated the equal protection guarantees of the Fifth Amendment; and (iii) violated the Due Process Clause of the Fifth Amendment in that it is unconstitutionally vague. *See General Media*, 952 F. Supp. at 1084.

The district court determined that "the purpose of the Act is to ban expression that is lewd." *Id.* at 1080. The district court further held that "because the First Amendment prevents the government from banning material solely because it is offensive," the Act violates the First Amendment. *Id.* The district court rejected the government's argument that the Act reasonably seeks to protect the military's professional appearance and to promote the military mission by fostering core values among personnel. The court reasoned that the Act "does nothing whatsoever to reduce the actual presence of sexually explicit material on military property," and that, absent congressional findings of fact, "it is unreasonable to equate the sale or rental of sexually explicit material in military exchanges with an official 'endorsement' " of that material. *Id.* at 1080-81.

Subjecting the Act to strict scrutiny, the court also held that section 2489a violated the equal protection guarantee of the Fifth Amendment. *Id.* at 1081-82. The district court noted that Congress made no factual findings, and that there was no evidence in the record, linking the Act to the military's goals of maintaining a professional image and of promoting core values. Similarly, the court found that there was no factual predicate to support the Act's distinction between audio or pictorial expression as opposed to written texts, as well as its differing treatment of books as opposed to periodicals. *Id.* at 1082.

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[6] An amended opinion and order, substantially identical in its holdings and statements of law, was entered on February 25, 1997.

The district court also held that the Act was void for vagueness because "the term 'lascivious' as it is used by the Act contains a subjective element." *Id.* at 1083. According to the district court, the risk that government officials would arbitrarily classify materials as sexually explicit "impermissibly chills plaintiffs' First Amendment rights," notwithstanding the fact that, as the court conceded, "plaintiffs cannot be directly penalized under the Act because its effect is only to prevent military personnel from stocking their product." *Id.*

This appeal followed.

II.

We review the district court's order entering a permanent injunction for abuse of discretion, which "can be found if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law." *See Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (internal quotation marks omitted). We consider in turn each component of the district court's decision that the Act (i) violates the Free Speech Clause of the First Amendment; (ii) violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment; and (iii) is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment.

A. The First Amendment

1. Forum Analysis

For purposes of the First Amendment's Free Speech Clause, the Supreme Court characterizes government property as falling into one of three categories. First, there is the "traditional public forum," which includes public streets and parks, and other "places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,

45 (1983)). The second category of government property is the "designated" public forum—"a place not traditionally open to assembly and debate," *Cornelius*, 473 U.S. at 802, but "which the State has opened for use by the public as a place for expressive activity," *Perry*, 460 U.S. at 45. In both traditional and designated forums that are fully open to the public, content-based regulations of speech are subject to "the highest scrutiny," and are permissible only if "narrowly drawn to achieve a compelling [governmental] interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).[6]

The third category of property, of most relevance in this case, is known as the "nonpublic forum," which consists of all remaining public property. *Id.* at 678-79. A limitation on speech in a nonpublic forum *may* be content-based, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992), and "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Lee*, 505 U.S. at 679; *see also Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991) (in nonpublic forum, "the state has maximum control over communicative behavior since its actions are most analogous to that of a private owner").

Governmental intent is said to be the "touchstone" of forum analysis. *Paulsen*, 925 F.2d at 69. The government does not create a public forum "by inaction or by permitting limited discourse," *Cornelius*, 473 U.S. at 802,

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[6] In designated public forums whose use is limited to particular purposes or speakers, restrictions on speech within those limits must be only reasonable and viewpoint neutral. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Travis v. Oswego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) (in limited public forum, a "sub-category of the designated forum," once government "allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre"); *Deeper Life Christian Fellowship, Inc. v. Bd. of Educ.*, 852 F.2d 676, 679-80 (2d Cir. 1988).

and when the state reserves property for its "specific official uses," it remains nonpublic in character, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). The Supreme Court has recognized that the government's dedication of property to a commercial enterprise is "inconsistent with an intent to [create] a public forum." *Cornelius*, 473 U.S. at 804. Likewise, evidence that the government has created a forum to further efficiency and administrative convenience suggests that the forum is nonpublic. *See id.* at 805. It is also well established that the presence of some expressive activity in a forum does not, without more, render it a public forum. *Id.* (citing *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981)).

Furthermore, the Supreme Court has emphasized that "it is 'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' . . . And it is consequently the business of a military installation . . . to train soldiers, not to provide a public forum." *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)). Accordingly, "[a]lmost without exception, courts have concluded that military bases fall into the non-public category." *Shopco Distrib. Co. v. Commanding General*, 885 F.2d 167, 172 (4th Cir. 1989). Military property generally becomes public in character only when the government has intentionally "abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression." *United States v. Albertini*, 472 U.S. 675, 685-86 (1985).

Appellees argue that the military exchanges are public forums.[7] Focusing specifically on the "newsstands" and

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[7] It is unclear whether appellees contend that the exchanges are "limited public forums" in the sense that this Court has used the term—that is, as a "sub-category" of the "designated" public forum, in which the government may place blanket exclusions on

"bookstores" within the exchanges, appellees invite us to adopt the view that these "newsstands" are public forums because the government has granted "access" to these places to magazines, newspapers, and other "speakers." We respectfully decline this invitation.

As noted above, governmental intent is the touchstone for determining whether a public forum has been created. In this inherently factual inquiry into intent, we may look to factors such as the government's policy and practice with respect to the forum, the nature of the property, and its compatibility with expressive activity. *See Cornelius*, 473 U.S. at 802.

As an historical matter, exchanges and their predecessors, canteens, were established in the 1890s to provide uniformity of operation and control that had been lacking under the earlier system, in which profiteering private "sutlers" followed and supplied the troops. *See* Joint App. at 407-410, *reproducing* Maj. Stephen E. Castlen, *Let the Good Times Role: Morale, Welfare, and Recreation Operations*, Army Lawyer, June 1996, at 3, 5-6. The government did not create military exchanges for the purpose of providing a forum for expressive activity. Today, as in the past, the purpose of the military exchanges is to provide "authorized patrons with articles and services necessary for their health, comfort and convenience and [to provide] a supplemental source of funding for [military morale, welfare, and recreation] programs." Joint App. at 114, *reproducing* DoD Directive 1330.9 (Dec. 15, 1986). Although it is true that military

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certain types of speech, but may not discriminate unreasonably or on the basis of viewpoint among instances of those types of speech that have not been excluded, *see Travis*, 927 F.2d at 692—or that the exchanges are fully open designated public forums, in which content restrictions on speech are subjected to strict scrutiny, *see Lee*, 505 U.S. at 678. *See* Appellees' Brief at 28-29 (arguing that Act is subject to strict scrutiny because exchanges are "designated as limited public fora"). The question is irrelevant, however, in light of our holding that military exchanges are nonpublic forums.

exchanges sell books, periodicals, and other expressive materials, they also sell many other non-expressive materials. The mere fact that expressive materials are among the wide variety of general merchandise sold at the exchanges does not imply that the forum thereby becomes a public forum for First Amendment purposes. *See Cornelius*, 473 U.S. at 805. Rather, because military exchanges are "engaged in commerce," their operation is generally inconsistent with the creation of a public forum. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality opinion).

The exchanges themselves are in no way *public*—in order to use a military exchange, or to purchase anything inside, patrons must show military identification. Only military personnel, their dependents, orphans, surviving spouses, and certain other affiliated personnel are admitted. These limits on patrons' access serve as another indicator that the government did not intend to dedicate the exchanges to expression and discourse; a limited audience would necessarily hinder, rather than further, the opportunities for communication by speakers such as appellees. The Supreme Court has noted that "separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." *Lee*, 505 U.S. at 680. As restricted-access areas, even on bases which may be otherwise open to the general civilian public, the exchanges are "separated" properties.

Moreover, far from granting unlimited access to military exchanges to various "speakers," the government has simply chosen to purchase certain magazines, newspapers, and videos from third parties, and has offered this merchandise for resale to its personnel at military exchanges. Much like a private sector retailer, the government identifies the products that it will stock for resale, selecting from a universe of merchandise that is far more extensive than the shelves of an exchange can hold. It does not offer to resell the merchandise of every producer, or every

"speaker," who seeks access to those shelves. *Cf. Air Line Pilots Ass'n Int'l v. Dept. of Aviation*, 45 F.3d 1144, 1158 (7th Cir. 1995) ("[T]he government's status as a proprietor is a factor entering into public forum analysis. Proprietor status suggests, for instance, that the government has the power to define or restrict the use to which public property should be dedicated." (internal citations omitted)). In particular, the exchanges are only authorized to sell certain enumerated products listed in Department of Defense regulations, including specific provisions governing the sale of reading materials. *See, e.g.*, Joint App. at 147-50, *reproducing* Memorandum of Understanding, "Selling of Reading Materials in Military Commissionaries Located on Army, Air Force Installations" (Apr. 29, 1994).

Because it cannot be said that the military has "abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression," *Albertini*, 472 U.S. at 685-86, we hold that the military exchanges governed by the Act are nonpublic forums.

2. Content & Viewpoint Discrimination

As noted above, the government may reasonably restrict expressive activity in a nonpublic forum on the basis of content, so long as the restriction is not "an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Lee*, 505 U.S. at 679. Appellees argue that the Act is in fact viewpoint-discriminatory (a question that the district court did not reach).[8] Were we

[8] The district court stopped short of the issue of viewpoint discrimination, and also of a holding on the nature of the forum, because it found that the Act did not promote a legitimate governmental interest. As these issues are questions of law, we are equally well positioned to decide them. Furthermore, in cases raising First Amendment issues we have "an obligation to make an independent examination of the whole record." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

to accept this characterization, the Act would be subject to much more exacting constitutional scrutiny.[9] We do not, however, agree with appellees. The Act assuredly distinguishes between permissible and impermissible speech on the basis of content, but it does not rise to the level of viewpoint discrimination.

As the Supreme Court has noted, the distinction between content and viewpoint discrimination "is not a precise one." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995). As a general matter, viewpoint discrimination represents a particularly "egregious" subset of content discrimination in which "the government targets not subject matter but particular views taken by speakers on a subject." *Id.* at 829. The Court thus suggests that the distinction is one between "subject matter" (content) and "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered" (viewpoint). *Id.* at 831. Working from this concededly imprecise distinction, we conclude that the Act does not involve viewpoint discrimination.[10]

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[9] *See Perry*, 460 U.S. at 48-49 (noting Seventh Circuit's application of strict scrutiny to viewpoint discrimination in nonpublic forum, *Perry Local Educators' Ass'n v. Hobit*, 652 F.2d 1286, 1295-97 (7th Cir. 1981), while proceeding on other grounds); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (stating, in context of nonpublic forum where restriction on speech was held to be viewpoint-discriminatory, that "the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech" (internal quotation marks omitted)); *cf. R.A.V. v. St. Paul*, 505 U.S. 377, 391-92 (1992).

[10] Another, related approach to what is meant by "viewpoint discrimination" also supports our conclusion. The Supreme Court's decisions dealing with viewpoint discrimination evidence particular hostility to restrictions specifically intended to suppress the circulation of the arguments on one side of a particular debate. *See, e.g., Lamb's Chapel*, 508 U.S. at 393 (finding viewpoint discrimination where school "permit[ted] school property to be used for the presen-

The Act prohibits the sale or rental of recordings and periodicals "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d). Appellees suggest that this construction targets a *viewpoint* portraying "women as sexual beings or as the focus of sexual desire," as well as a *viewpoint* of "lasciviousness." Appellees' Brief at 25. Even apart from the absence of any references to gender in the Act or its implementing directive,[11] we find this line of argument unconvincing. To conceive of lasciviousness as a "specific premise" or "a standpoint from which a variety of subjects may be discussed and considered" strikes us as linguistic

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tation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint"); *R.A.V.*, 505 U.S. at 384 (government may not "proscrib[e] only libel critical of the government"), 388 (government may criminalize threats of violence against the President, but not "only those threats . . . that mention his policy on aid to inner cities"). Yet laws that restrict the dissemination of defined kinds of expression for reasons that stop well short of suppression of speech are less likely to be found constitutionally offensive on viewpoint grounds. *See, e.g., Perry*, 460 U.S. at 49 (finding no viewpoint discrimination where school allowed use of internal mail system by one union but not by rival union where reason for distinction was respective status of unions); *Lehman*, 418 U.S. at 304 (plurality opinion) (upholding, without any mention of viewpoint discrimination, city policy not to accept political advertisements on public transit system where reason for policy was to avoid appearance of favoritism). The statute at issue here falls into the latter category—it is apparently directed not to suppressing, but to disassociating the military from, appellants' speech. The Act prohibits the *military-sponsored* sale or rental of sexually explicit materials, but it does not suppress the private purchase, circulation, receipt, or possession of such materials on military property. By this reading too, then, the Act does not offend the prohibition against viewpoint discrimination.

[11] We cite the Act's gender neutrality not because it establishes the Act's viewpoint neutrality, but because it suggests that the appellees' own definition of the viewpoint allegedly under attack ("women as sexual beings") is contrary to the plain language of the statute.

overreaching; how, for example, would one go about discussing and considering the political issues of the day from a lascivious viewpoint? The adjective "lascivious" is much more plausibly understood as helping to identify more particularly the subject matter (*i.e.*, content) that the Act encompasses: namely, depictions of nudity including sexual or excretory activities or organs, but only those depictions that are also lascivious.

We note that the Supreme Court has suggested in dicta, but in an opinion that strictly applied the Constitution's prohibition against viewpoint discrimination, that "[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." *R.A.V.*, 505 U.S. at 388. Thus prurience and patent offensiveness are apparently permissible grounds on which to discriminate—and by implication, they do *not* constitute "viewpoints" (against which the government may not discriminate).[12] Insofar as *R.A.V.* equates prurience and patent offensiveness with "lascivious displays of sexual activity," lasciviousness too is impliedly not a "viewpoint." Other Supreme Court precedents construing the First Amendment support, by analogy, the reasoning that a distinction based on lasciviousness is viewpoint neutral. *See Bethel School Dist. N. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (school's sanctions "in response to [respondent's]

[12] We recognize, as the district court pointed out, that the language quoted is addressed to obscene speech, which is largely unprotected by the First Amendment, while speech that receives the protection of the First Amendment is at issue in this case. This does not mean, however, that the *R.A.V.* opinion and its logical implications are irrelevant to protected speech. To the contrary, *R.A.V.* provides that the First Amendment's prohibition against viewpoint discrimination applies to *both* protected and unprotected speech. 505 U.S. at 383-84, 391-92. The inference we draw from *R.A.V.* (above) that prurience and patent offensiveness are not viewpoints should similarly apply to both protected and unprotected speech.

offensively lewed and indecent speech" were permissible, given that "the penalties imposed in this case were unrelated to any political viewpoint"); *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) ("an unconstitutional motivation would *not* be demonstrated" if school board removed books because they "were pervasively vulgar," rather than because of any intent to deny access to disfavored ideas).

In sum, we conclude that the Act discriminates on the basis of content, but not on the basis of viewpoint.

3. "Reasonableness" Analysis:

We now reach the question actually decided by the district court: whether the Act's restrictions on expressive activity are reasonable and therefore consistent with the Free Speech Clause of the First Amendment. Employing the same reasonableness standard used by the district court, but reaching the opposite conclusion, we hold that they are.

Because we conclude that the Act regulates speech in a nonpublic forum in a viewpoint-neutral manner, the Act need only be reasonable in light of the purpose of the forum, *Perry*, 460 U.S. at 49, and reflect a legitimate government concern, *Paulsen*, 925 F.2d at 69, in order to pass constitutional muster. The Supreme Court has admonished that a restriction in a nonpublic forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

Furthermore, we have only recently noted that "[i]t is plain to us that governmental restrictions on speech that would run afoul of the Constitution if imposed in civilian life can pass constitutional muster in the military context." *Able v. United States*, 88 F.3d 1280, 1294 (2d Cir. 1996). "Our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society . . . and

the tests and limitations to be applied may differ because of the military context." *Id.* (internal citations and quotation marks omitted).

This deference arises from the long-recognized distinctive conditions of military life. The Supreme Court has instructed that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). This is so because, as the Court has observed, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian, and . . . the rights of [persons] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker*, 417 U.S. at 744 (internal citations and quotation marks omitted). Moreover, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . affairs." *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

As the Court has emphasized, "civil courts are ill equipped to establish policies regarding matters of military concern." *Solorio v. United States*, 483 U.S. 435, 448 (1987) (internal quotation marks omitted). For these reasons, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Goldberg*, 453 U.S. at 70. We are not free to ignore this admonition. We believe the district court erred by not giving due credit to the singular governmental interests in oversight of the military, and to the reasonableness of the measures selected to advance those interests in the instant case.

The appellees argue, and the district court apparently agreed, *see General Media*, 952 F. Supp. at 1080, that,

in order to identify the governmental interest furthered by the Act, a court must find or uncover either legislative history or a statement of the purpose of the statute within its text.[13] The appellees have not drawn to our attention any authority for the proposition that a statute may be held defective because its legislative history is sparse or virtually non-existent, nor are we aware of any such authority. Indeed, if the sparseness of legislative history were a basis for invalidation of acts of Congress, a wide swath of legislation could fall before the judicial axe. In any event, the very title of the Act—the Military Honor and Decency Act—suggests the governmental interest that the statute purports to advance.

The government argues that the sale by the military of lascivious materials in military exchanges risks sending a message that the military approves of or endorses these materials. The pervasive authority of the hierarchical chain of command in the military setting could reasonably lead a servicemember to conclude that such materials were sanctioned by superior officers—a conclusion that would prove accurate, for example, in the case of Navy exchange facilities, where the Navy's resale regulations provide that "adult" magazine titles stocked by the exchange, and even the determination of which magazines qualify as "adult-oriented," are to be "coordinated with

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[13] In particular, appellees and *amici* focus considerable attention on the public statements of various legislators during and after the Act's passage—from which we are apparently asked to divine the true purpose of the measure. However, the motivations of individual legislators, to the extent we may be able to discern them, are not dispositive. As the Court of Appeals for the Ninth Circuit has recognized, "remarks of a legislator, *even those of the sponsoring legislator*, will not override the plain meaning of a statute." *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991) (emphasis supplied). We agree. Even where the meaning of a statute would benefit from exposition, legislators' pre-passage remarks are not presumptively conclusive. Furthermore, the *post*-passage press release of an individual legislator, upon which appellees rely, cannot be accorded any significance or weight.

the base commanding officer." Joint App. at 204, *reproducing* Navy Resale Manual vol. 4, § 4108(6)(a)(1). The government argues that its sale of such materials could tarnish "the military's image of honor, professionalism, and proper decorum. It notes that "[t]he military also encourages its personnel to 'lead by example' and to display the highest form of personal and professional conduct." This policy, in the government's view, could be undermined if military personnel believed that military commanders approved of the sale of the proscribed materials at exchanges.[14] Accordingly, the government argues that the Act promotes military honor, professionalism, proper decorum, and military "core values." [15]

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[14] We also note that the government's interest in disassociating itself from sexually explicit materials may be enhanced by the military's role as an employer. Military installations are workplaces for the civilian and military personnel assigned there; like private sector employers, the military may have an interest in maintaining a workplace environment that is efficient and focused on the task at hand—not one littered with materials that are "intended or designed to elicit a sexual response," DoD Directive-Type Memorandum (Dec. 22, 1996).

[15] The dissent argues that this objective—the government's promotion of military honor, professionalism, and proper decorum, *as defined by Congress and the military*—is itself proof that the Act is viewpoint discriminatory. This is so, according to the dissent, because the government's determination that the sale of lascivious materials is inconsistent with these military values deprives individual soldiers of "the right to decide for themselves whether such depictions are consistent with those values." *Post* at ——. Apparently, then, the military may not promote or enforce its own definition of honor, professionalism, and proper decorum, because if it does so, thereby trumping a soldier's own definitions of those terms, it will be engaging in unconstitutional viewpoint discrimination. We think this cannot be the case: surely, for example, the military could decide that bigotry is inconsistent with military professionalism and proper decorum, not to mention honor, and could promote that definition, overriding, individual soldiers' opinions to the contrary. Indeed, the dissent itself asserts that it "do[es] not doubt that the government can lawfully enact statutes that promote the military's image of honor, professionalism, and proper decorum, or foster core values." *Post* at ——.

We are neither free nor inclined to disregard or treat cavalierly military goals and policies put forward by the government where Congress has exercised its constitutional responsibility of "mak[ing] Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, and the Chief Executive and "Commander in Chief of the Army and Navy of the United States," U.S. Const. art. II, § 2, cl. 1, has signed the Act into law and speedily implemented it by executive directive. The government's stated goals are clearly promoted by a policy of ending the military's involvement in the sale of sexually explicit materials. Accordingly, we hold that the Act reflects a legitimate governmental concern.

To pass constitutional muster, the Act must also be "reasonable" in light of the purpose of the forum. *See Perry*, 460 U.S. at 49. As outlined above, the purpose of military exchanges is to operate as commercial outlets at which servicemembers may purchase "articles and services necessary for their health, comfort and convenience." Revenues from exchanges also supplement the funding of military morale, welfare, and recreation programs. Congress could reasonably conclude that sexually explicit materials are not "necessary" to the health, comfort and convenience of members of the armed forces. Furthermore, like any commercial retailer, the military must make decisions about what articles to stock on its limited shelf space. In doing so, a retailer may reasonably take into account not only profit margins, but also the special circumstances of its clientele. Here, the special circumstances of the military environment, in which the appearance of professionalism and proper conduct is critical, could reasonably lead to the conclusion that this retailer should not stock sexually explicit materials. The Act is thus reasonable in light of the purpose of the military exchange "forum."

The Act is also a "reasonable" means of promoting the government's legitimate interest in protecting the mili-

tary's image and its core values. The Act bars the sale or rental of sexually explicit materials on military property by military employees acting in an official capacity. This legislation is specifically targeted at the problem identified above—that military honor, professionalism, and decorum will be affected or tainted by the official, military-sponsored sale of such materials. The problem the Act seeks to address, in short, is that the military should not be in the business of selling sexually explicit materials, and the solution embodied in the Act is to forbid the military from doing so. This would appear to be an altogether reasonable means of distancing the military from a perceived endorsement of these materials.

For the reasons set forth above, we hold that the Act does not violate the First Amendment.

B. The Equal Protection Guarantee of the Fifth Amendment's Due Process Clause

The district court also found that the Act violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment. Specifically, it found that the Act's disparate treatment of books and periodicals (barring only the latter), and its restrictions on pictorial and audio expression, but not on written text, violated the Fifth Amendment's guarantee of equal protection. *See General Media*, 952 F. Supp. at 1082.

We approach equal protection claims under the Fifth Amendment in the same way as we would such claims under the Fourteenth Amendment. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). In considering whether legislation violates equal protection principles, "[a]t a minimum, a statutory classification must be rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under this analysis, a statutory classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis

for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Classifications affecting fundamental rights, however, must survive heightened scrutiny. *Id.* The Supreme Court has noted that "[w]hen government regulation discriminates among speech-related activities *in a public forum*, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (emphasis supplied) (finding equal protection violation based on discrimination among expressive activities in public forum); *see also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96-97 (1972) (same). That exacting standard of review is not applicable here, however, because "[t]he key to those decisions [*Carey* and *Mosley*] . . . was the presence of a public forum." *Perry*, 460 U.S. at 55. Here, where a nonpublic forum is involved and where, as we have found, there is no First Amendment violation, the Act need only survive rational-basis analysis. *See id.* at 54-55; *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 231 (2d Cir. 1996).

The Act's distinction between written and visual forms of expression, and its ban on lascivious expression contained in audio, video, and periodical materials, but not in books, are rationally related to a legitimate governmental interest. Congress could rationally have concluded that exchanges do not trade extensively in books containing sexually explicit material and that, consequently, it was unnecessary to include books under the Act's prohibition. Congress could also have rationally concluded that visual forms of lascivious expression are more prevalent, more likely to be noticed, or more provocative than written materials, and that accordingly there was a greater need to regulate such materials. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy

there, neglecting the others."); *see also Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Rational basis review does not pass judgment upon the wisdom, fairness, or logic of legislative decisions; it turns on whether there are "plausible" reasons for Congress's choices.[16] *Beach*, 508 U.S. at 313-14. Because there are rational justifications for the classifications created by the Act, the appellees' equal protection claim fails.

C. *Vagueness Under the Due Process Clause of the Fifth Amendment*

The district court also found the Act to be vague, in violation of the Due Process Clause of the Fifth Amendment. We disagree, believing that the district court here too was insufficiently sensitive to the particular context presented—namely, the specialized and strictly-regulated community of the armed forces.

The Due Process Clause requires that laws be crafted with sufficient clarity to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and to "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The degree of linguistic precision that will satisfy these requirements, however, varies with the nature —and in particular, with the consequences of enforcement

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[16] We note that the absence of "Congressional findings of fact . . . and evidence on the record" in support of these distinctions, *General Media*, 952 F. Supp. at 1082, has no bearing on our analysis. *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). It is even irrelevant "whether the conceived reason for the challenged distinction actually motivated the legislature" so long as there is a "plausible reason[] for Congress' action." *Beach*, 508 U.S. at 313-15 (internal quotation marks omitted).

—of the statutory provision. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). For example, as the Supreme Court noted in a criminal obscenity case, "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948); *see also Village of Hoffman Estates*, 455 U.S. at 498-99. At the same time, statutes that implicate constitutionally protected rights, including the freedoms protected by the First Amendment, are subject to "more stringent" vagueness analysis. *Village of Hoffman Estates*, 455 U.S. at 499.

These generally applicable standards, however, are modified in the military setting. We have recently reiterated the longstanding principle that "the [constitutional] tests and limitations to be applied may differ because of the military context," *Able*, 88 F.3d at 1294, and the Supreme Court has instructed us that substantial judicial deference is required in the military setting, *see, e.g., Goldberg*, 453 U.S. at 70. Specifically, the Court has stated that "[f]or the reasons which differentiate military society from civilian society . . . Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker*, 417 U.S. at 756.

Applying these principles to the Act before us, it is clear the statute may fall short of absolute linguistic precision and yet still comply with the requirements of the Due Process Clause of the Fifth Amendment. First, the Act carries with it no criminal penalties; in fact, it specifies no penalties at all. The "penalty" that appellees complain of is an indirect one: if the Act is enforced against military personnel and the Department of Defense (who are, after all, the entities who are barred from selling or renting sexually explicit materials), appellees will suffer the penalty of losing the government's assistance in (re)-selling their wares. Appellees will lose their preferred

retail outlets for members of the armed forces, but they are not prevented from selling and renting sexually explicit material directly to servicemembers. Second, the Act represents an exercise of Congress's constitutional power to prescribe "Rules for the Government and Regulation" of the armed forces, U.S. Const. art. I, § 8, cl. 14. As such it must be accorded the "greater breadth and greater flexibility" indicated by the Supreme Court in *Parker*, 417 U.S. at 756. And third, while the Act implicates expressive activity and thus warrants a more stringent vagueness analysis, *Parker* is again instructive. That case too involved expressive activity—a military officer's statements to other servicemembers—that was the basis for a conviction for, *inter alia*, "conduct unbecoming an officer and a gentleman." 417 U.S. at 737-38. Although it involved a direct penalization of speech, the Supreme Court accorded Congress "greater flexibility" and upheld the Uniform Code of Military Justice provision against a vagueness challenge. *See id.* at 756-57. Congress is entitled to that same flexibility here, where the penalties are far less direct or severe.

Measured by these guideposts, we conclude that the Act does not offend the Due Process Clause of the Fifth Amendment. Many of the terms employed in the Act, read in light of the explanatory directive implementing it, have been found by the courts to be sufficiently clear for constitutional purposes. And whatever ambiguity remains, if any, is constitutionally tolerable in light of the generous vagueness standard outlined above.

For example, the Supreme Court has rejected as "insubstantial" a claim that the term "lascivious" in a criminal statute was unconstitutionally vague. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994). In doing so the Court explicitly adopted the view of the Court of Appeals for the Ninth Circuit that "lascivious" could be equated with "lewd," *id.*, which the Ninth Circuit described as "a commonsensical term whose consti-

tutionality was specifically upheld in *Miller v. California* [413 U.S. 15 (1973)]." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992) (internal citation and quotation marks omitted), *rev'd on other grounds*, 513 U.S. 64 (1994). The district court in the instant case nevertheless found vagueness in the adjective "lascivious" based on its determination that the word "contains a subjective element." *General Media*, 952 F. Supp. at 1083. We note that the same could be said for any number of the words which in combination make up our constitutional test for obscenity. *See Miller*, 413 U.S. at 24.[17] Other terms employed in the Act and its regulations are also familiar to the courts. The term "dominant theme," for example, has long been employed in First Amendment law. *See, e.g., Roth v. United States*, 354 U.S. 476, 489 & n.26 (1957); *United States v. Petrov*, 747 F.2d 824, 830 (2d Cir. 1984).

The question presented is not whether the Act or its terms include *any* ambiguity or "subjectivity"; in some expansive sense, *all* words contain a degree of imprecision and are unavoidably open to interpretation. The question is whether any ambiguity that does exist rises to the level of unconstitutional vagueness under the Due Process Clause of the Fifth Amendment. In light of the permissiveness of the scrutiny that we apply to this military regulation carrying only indirect, financial consequences, we hold that it does not.

III.

To summarize:

(1) In adopting the Act, Congress reasonably furthers legitimate governmental interests—*inter alia*, upholding

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[17] *Miller* specifies that "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value" may be regulated as legally obscene. 413 U.S. at 24.

military honor, professionalism, and proper decorum by eliminating the appearance of official endorsement inherent in the military's resale of the proscribed materials—and it does so in a nonpublic forum, without engaging in viewpoint discrimination. Accordingly, the Act does not violate the Free Speech Clause of the First Amendment.

(2) The Act's distinctions among the types of materials it regulates are rationally related to legitimate governmental interests. As a result, those distinctions do not run afoul of the equal protection guarantee of the Due Process Clause of the Fifth Amendment.

(3) The Act is sufficiently clear, in light of the appropriate level of scrutiny accorded to a military regulation carrying only indirect, civil penalties, to survive a vagueness challenge under the Due Process Clause of the Fifth Amendment.

Accordingly, the judgment of the district court is vacated and the cause is remanded with instructions to enter judgment for appellants.

PARKER, *Circuit Judge*, dissenting:

Freedom of speech is one of those liberties which is so fundamentally essential to the preservation of a stable Government that the Government itself is generally prohibited from interfering with it, and as an Article III court, we are bound to protect it. But the power of Congress to "raise and support Armies" and "provide and maintain a Navy" under Article I, § 8, of the Constitution is also critical to the preservation of both a stable Government and to the protection of our liberties, of which the First Amendment is one. In cases of conflict, the balance is often struck in favor of protecting the military mission. This is true, not only with respect to strategic defense matters such as the protection of sailing dates and location of troops,[1] but also with respect to that part of the military mission directed toward the preparation of armies and navies "to fight or be ready to fight wars should the occasion arise," *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). " 'The armed forces depend of a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.' " *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *United States v. Gray*, 20 C.M.A. 63 (1970)).

For these reasons, the Supreme Court has held that "judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is chal-

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[1] In a time of war, for example, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

lenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). However, "deference does not mean abdication," *id.* "[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind them when they enter military service." *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).[2] In short, the fact that the interests of the individual may sometimes be validly subordinated to " 'the needs of service,' " *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)), does not mean service members lose those rights whenever Congress, in exercising its power to raise armies, so desires. When First Amendment protection bows to the military's desire to suppress certain ideas without a clear and strong reason, desire to protect our liberties with a strong military authority may end up eroding our liberty to speak freely and to be tolerated in doing so.

The Military Honor and Decency Act of 1996, 10 U.S.C. § 2489a (the "Act"), prohibits "the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense," which includes military exchanges. 10 U.S.C. § 2489a(a), (d)(2). The Act bans audio and video recordings, and periodicals with visual descriptions, produced in any medium, but does not ban purely written material. 10 U.S.C. § 2489a (d)(1). The term "sexually explicit material" is defined as material "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." *Id.* "Lascivious" is defined by the implementing regulations to mean "lewd and in-

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[2] *See also Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("These aspects of military life [obedience and unity] do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment."); *United States v. Robel*, 389 U.S. 258, 264 (1967) (" 'Even the war power does not remove constitutional limitations safeguarding essential liberties' ") (citations omitted).

tended or designed to elicit a sexual response." Department of Defense Directive-Type Memorandum, "Sale or Rental of Sexually Explicit Material on DoD Property" (Dec. 22, 1996). This memorandum also establishes the "Resale Activities Board of Review," which has "the authority and responsibility to periodically review material offered or to be offered for sale or rental" at exchanges, and to determine whether such material is "sexually explicit" as defined by the memorandum. *Id.*

The court below granted appellee's request for permanent injunctive relief on the basis that the Act violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. It reasoned that because the purpose of the Act was to ban expression that the government conceded was "offensive" and "because the First Amendment prevents the government from banning material solely because it is offensive," the Act was unconstitutional. The district court did not decide whether a military exchange is a public or nonpublic forum, nor whether the Act was viewpoint discriminatory. I agree with the majority that, as these issues are questions of law, we are equally well positioned to decide them. However, that is where my agreement with the majority ends. I would affirm the district court's opinion.

I.

The Military Honor and Decency Act of 1996 does not prohibit the distribution of all sexually explicit material in military exchanges. Nor does it ban all depictions of nudity. Instead, it bars only the distribution of sexually explicit material, "the dominant theme of which depicts or describes nudity . . . in a lascivious way." Because I believe this is viewpoint discrimination, and the government has failed to meet its burden of justification for this restriction on speech, I respectfully dissent.

The Act's definition of sexually explicit material includes within its scope much that is not encompassed

within the Supreme Court's definition of "obscenity," which enjoys virtually no First Amendment protection. To be "obscene" under *Miller v. California*, 413 U.S. 15 (1973), a publication must (a) taken as a whole and applying contemporary community standards, appeal to the prurient interest, (b) contain patently offensive depictions or descriptions of specified sexual conduct, and (c) on the whole have no serious literary, artistic, political or scientific value. *Id.* at 24-25. *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497 (1985). The Act does not refer to the prurient interest or to the standards of the community. Nor does it require that the work lack literary, artistic, political or scientific value. The Act therefore covers both protected and unprotected speech. *See also Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."). It is the protected speech that is addressed here.

It is axiomatic that the government may not restrict speech because of the message it conveys. *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972); *see also Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ——, 115 S. Ct. 2510, 2516 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."). Moreover, "[w]hen government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination." *Id.*; *see also Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) ("Viewpoint discrimination is censorship in its purest form . . ."). Even in a nonpublic forum, the government may not regulate speech in "an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46; *see also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Although a speaker may be ex-

cluded from a nonpublic forum if he wishes to address a topic not encompassed within the purposes of the forum . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.")[3]

As the majority points out, the distinction between content and viewpoint discrimination is not "a precise one." However, the majority's assertion that "lascivious" is an adjective identifying subject matter does not advance the inquiry: viewpoints and subject matters are both identified by some adjective—the question is whether the statute will skew one side of a debate. "Indecent" speech, or even "sexually explicit" speech, may be regarded as a category of speech, and the regulation of such speech is a content-based regulation. *See Sable Communications*, 492 U.S. at 126. To divide that category between depictions of nudity and other depictions, is yet another division, one step closer to viewpoint discrimination. But in banning distribution of only those depictions of nudity that are "lascivious," defined as "lewd and intended or designed to elicit a sexual response," the government is necessarily attempting to regulate a specific perspective—a point of view.

Portrayals of nude men and women designed to elicit a sexual response illustrate an idea: that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination. Depictions of nude men and women in nonsubmissive ways, or in ways not designed to arouse, are permitted under the Act. This is, under relevant precedent, viewpoint discrimination. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (de-

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[3] Since I conclude that the Act is viewpoint discriminatory, I do not need to decide, and express no view on, whether a military exchange on a military base constitutes a traditional or "designated" public forum or a nonpublic forum.

nying permission to evangelical church to use school facilities to show a film about child rearing and family values solely because the film dealt with a subject from a religious perspective was viewpoint discriminatory when that subject had not been placed off limits to any and all speakers); *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985) (striking down an ordinance prohibiting trafficking in pornography, where pornography was defined as expressive material that depicts women as sexual objects, or as enjoying or deserving humiliation), *aff'd mem.,* 475 U.S. 1001 (1986); *AIDS Action Comm. v. MBTA,* 42 F.3d 1, 12 (1st Cir. 1994) (holding that transit authority's refusal to accept advertisements regarding AIDS prevention for display in subway cars when it had allowed other sexually explicit material to be advertised which represented "the conventional exploitation of women's bodies" was viewpoint discrimination). It is no answer that the Act excludes such depictions of both men and women: the exclusion of "an entire class of viewpoints" is "just as offensive to the First Amendment as exclusion of only one." *Rosenberger,* 115 S. Ct. at 2518. If multiple voices are silenced, the debate is simply skewed in multiple ways. *Id.*[4]

Nor is this form of expression any less deserving of protection because it may work through "inexpressible emotions," *Cohen v. California,* 403 U.S. 15, 26 (1971). Just as words may be chosen for their emotive force, *id.*, so too visual pictures can be chosen for their ability to arouse or offend. By restricting the sale of depictions which some viewers find offensive and others titillating, the government favors and protects the viewpoint of those offended and restrict the viewpoint of those who are titillated. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit

[4] Thus, the majority's allusion to the fact that the Act does not reference gender does not alter the statute's viewpoint discriminatory characterization.

the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Indeed, the government's defense of the statute unmasks the Act's viewpoint discrimination. The government asserts that the statute serves the government's interest in preserving "the military's image of honor, professionalism, and proper decorum." The underlying premise is that the military's distribution of depictions of nudity that are lewd or intended to elicit a sexual response are inconsistent with "honor, professionalism, and proper decorum." Yet the decision to ban distribution of such material strips military personnel of the right to decide for themselves whether such depictions are consistent with those values.[5] It even arguably denies them the right to determine which displays of nudity are lascivious.[6] "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving

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[5] The fact that this decision is removed from the potential consumers and rests entirely in the discretion of the Resale Activities Board of Review increases the danger that the government is censoring viewpoints. As the Supreme Court stated in *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 763 (1988):

> [A] law or policy permitting communication in a certain way for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

[6] I disagree with the majority's assertion that this argument would prevent the military from enforcing its own definition of honor, professionalism and decorum, such as by deciding that bigotry is inconsistent with those goals, ante at ——. The fact that the government could present a valid military interest to justify regulation of bigotry within the military does not alter the analysis of whether such regulation is viewpoint discriminatory in the first instance. As noted below, post at —— n.8, it is clear that the military can, in certain circumstances, prohibit expression because of the message conveyed. To do so, however, it must also show how conveyance of the message will interfere with performance of the military mission.

of expression, consideration, and adherence." *Turner Board. Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994); *see also Board of Educ. v. Pico,* 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom.").

Thus, the majority's claims that one does not "go about discussing and considering the political issues of the day from a lascivious viewpoint," is beside the point. It ignores the political issue of whether nonobscene, lascivious material, whatever form it may take, is necessarily inconsistent with the military's image of honor, professionalism and decorum, or the promotion of core values.

The majority's claim that the Supreme Court's dicta in *R.A.V. City of St. Paul,* 505 U.S. 377, 388 (1992), that "[a] State might chose to prohibit only that obscenity . . . which involves the most lascivious displays of sexual activity," authorizes the government to ban distribution of all lascivious portrayals of sexually explicit materials, ante at ——, is misguided for two reasons. Not only is nonobscene sexually explicit speech protected, unlike the obscene speech which is the subject of the Supreme Court's hypothetical, but to exclude only the most lascivious displays of sexual activity still allows in "the marketplace of ideas" the views expressed by lascivious displays of sexual activity, even if it prohibits the most extreme of those views.

II.

Laws which favor one viewpoint over another are traditionally subjected to the highest level of scrutiny.[7] The

[7] As the majority notes, the Supreme Court has at least twice noted without disapproval Circuit Court's application of strict scrutiny review to viewpoint discrimination. *See Perry,* 460 U.S. at 48-49 (holding that the exclusion of rival union from teachers' internal mail system was viewpoint neutral and therefore valid); *Lamb's Chapel,* 508 U.S. at 394 (holding a law invalid as viewpoint discriminatory); *see also R.A.V.,* 505 U.S. at 431 (Stevens, J., con-

question is whether, in reconciling the deference due Congress in military matters and our own constitutional responsibility, we must not only give deference to the military judgment as to the importance of the military interest, but must also lower the level of First Amendment scrutiny that would otherwise be applied.

In *Parker*, the Court upheld a court-martial conviction of an army captain for conduct designed "to promote disloyalty and disaffection among the troops" for publicly advocating that no "colored soldier" should go to Vietnam, and should refuse to fight if sent because they are discriminated against. 417 U.S. at 758. The Court stated:

> While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id.

Thus, it is clear that, on a military base, some regulations [8] that restrict speech because of the message con-

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curring) ("[V]iewpoint-based restrictions of expression require greater scrutiny that subject-matter-based restrictions."). However, the view that viewpoint discrimination is per se unconstitutional has also been expressed. *See, e.g., R.A.V.*, 505 U.S. at 392 (Scalia, J., for the Court) ("[The City] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

[8] The article of the Military Code under which Levy was convicted extended to " '[c]ertain disloyal statements by military personnel,' " and was intended to cover viewpoint-based speech: " '[e]xamples are utterances designed to promote disloyalty or disaffection among troop, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.' " *Parker*, 417 U.S. at 753 (quoting the Manual for Court's Martial 213c (1969)).

veyed are permissible. But the speech in *Parker* was obviously central to the military mission: as the Supreme Court noted, while there was a possibility that the articles of the military code under which Levy was convicted could extend to conduct protected by the First Amendment, Levy's conduct, "that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment." *Id.* at 761. Where the speech and the message conveyed are less harmful to the military mission, courts have declined to uphold the restriction. *See, e.g., Schacht v. United States*, 398 U.S. 58, 61-62 (1970) (striking down a law making it a crime for an actor wearing a military uniform to criticize the conduct or policies of the Armed Forces, or say anything that would "tend to discredit" the military); *Bryant v. Secretary of the Army*, 862 F. Supp. 574, 584 (D.D.C. 1994) (striking down portion of legislation prohibiting publication in Army newspaper of material "non in consonance" with Army policy).

In *Brown v. Glines*, 444 U.S. 348 (1980), the Supreme Court considered a regulation which authorized an army base commander to exclude campaign literature (in the form of leaflets and pamphlets) from the base, when such literature presented a "clear danger to the loyalty, discipline, or morale" of the troops. *Id.* at 350. The Court emphasized that the regulations "specifically prevent[ed] commanders from halting the distribution of materials that merely criticize the Government or its policies" and that under the regulations the Air Force commanders had no authority "to prohibit the distribution of the magazines and newspapers through regular outlets such as the post exchange newsstands." *Id.* at 355.[9] The Court upheld the

[9] The Court also noted a Department of Defense Directive that advised commanders to "preserve servicemen's 'right of expression . . . to the maximum extent possible, consistent with good order and discipline and the national security.'" *Id.* at 355.

regulations because they "restrict[ed] speech no more than [was] reasonably necessary to protect the substantial government interest." *Id.* at 358.

Last year this Circuit picked up the intermediate standard of review articulated in *Brown v. Glines* and stated in dicta that the test should be applied to content-based restrictions as well as content-neutral restrictions:

> In the military context, however, as noted above, free speech rights are substantially diminished and the court's deference to the views of Congress and the military as to the need for speech restriction based on the requirements of discipline and readiness is high. Arguably, even a content-based restriction in the military context need only pass the test of *Brown v. Glines.*

United States v. Able, 88 F.3d 1280, 1296 (2d Cir. 1996). Although I am not convinced that it is appropriate to take the further step of applying this intermediate standard of review to laws which discriminate on the basis of viewpoint, I do not need to decide that issue here. Even applying the intermediate standard of review in this case, the government has failed to meet its burden.

III.

The government argues that pornography is "controversial and unpalatable to many" and that "Congress could therefore reasonably conclude that the exchanges' traffic in lascivious merchandise tarnishes the military's image of honor, professionalism, and proper decorum." It is, additionally, argued that the possible perception of military personnel that lascivious material sold at the base exchanged has been approved by the chain of command "subverts the military's goal of promoting core values." The government further claims that the Act is "narrowly tailored to prevent only the official condonation of this merchandise" because it leaves military per-

sonnel free to possess, view or listen to sexually explicit material either on or off base, and to acquire such material from private retailers through the mail or from each other if done unofficially.

The fact that Congress "could" have drawn such a conclusion, however, provides the Court no reason to conclude that Congress in fact did so, nor does it assist the inquiry whether a ban of distribution is necessary to protect the military's image. Significantly, the government offers no evidence, by way of congressional hearings, official reports, explicit congressional findings of fact, or military judgment to support its claims. Instead, the government urges us to accept its unsubstantiated post-hoc rationalization on the principle of judicial deference to congressional choice.

There is no question that "when evaluating whether military needs justify a particular restriction . . . courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman*, 475 U.S. at 507. This is not just because the military is a "specialized society separate from civilian society," and because the "'right of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," *Parker*, 417 U.S. at 743-44 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)), but because, as this Court in *Able* pointed out, "[a]s judges, we are 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" 88 F.3d at 1293 (quoting *Goldman*, 475 U.S. at 507).

However, the precedents supporting judicial deference to military judgment have relied on substantial evidence of the types outlined above, to justify the infringement on the constitutional right at issue. *See, e.g., Rostker*, 453 U.S. at 72-74 (upholding, over an equal protection challenge, a regulation authorizing the President to require

registration for military service of males but not females, deferring to extensive national attention and public debate, a report of the Senate Armed Services Committee, hearings held by both Houses and consideration by various other committees that "clearly establish[ed] that the decision to exempt women from registration was not the 'accidental by-product of a traditional way of thinking about females.' ") (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)); *Able*, 88 F.3d at 1285-86 (noting that extensive hearings were held in both houses of Congress on the issue of the military's treatment of homosexuals following Presidential directive to revise policy, and the Act itself contained 15 separate findings justifying Congress' decision to enact the "Don't ask, Don't tell" policy). *See also Parker*, 417 U.S. at 740-41 (noting that the district court relied on "the voluminous record of the military proceedings" and that "the military tribunals had given fair consideration [to appellee's claims]"). In this case, the only evidence the government offers in support of its arguments is the title of the Act.

I do not doubt that the government can lawfully enact statutes that promote the military's image of honor, professionalism, and proper decorum, or foster core values. It can, for example, validly prosecute military personnel for conduct "unbecoming an officer and a gentleman." *See, e.g., Holley v. United States*, 1997 WL 592487 (Fed. Cir. Sept. 19, 1997) (upholding discharge of officer for taking drugs and contaminating sample for drug test). Conduct "unbecoming an officer and a gentleman" may even comprise speech. *See, e.g., Parker*, 417 U.S. at 738 (noting that Levy was also convicted for "wrongfully and dishonorably" making statements provoking disloyalty). The question is whether that is the substantial governmental interest that motivated Congress in this case. As the Supreme Court stated in *Turner Broad. Sys.*:

> That the Government's asserted interests are important in the abstract does not mean, however, that the

> must-carry rules will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

512 U.S. at 664 (citations omitted).

As the district court found, there is no evidence on the record "to show that the actual sale or rental of sexually explicit material—as opposed to its possession—causes the alleged harm to the military's core values and appearance to the civilian world." On appeal, the government urges us to accept the mere possibility that military personnel might view sale of lascivious materials as official endorsement of such materials. Besides the fact that there is no evidence that this "risk" of perceived official endorsement is real, it defies common sense. Prior to the Act, local exchanges were directed to "[s]elect magazines based on merchandising considerations like consumer demand [and] shelf space." EOP Procedures, 40-11, Special Retail Programs, Chapter 10, § 10-2. Thus, the magazine selection reflect the views of the military personnel, not that of the government. Additionally, the military exchanges also sell alcohol and tobacco, and there is no suggestion that the military is regarded as endorsing drinking or smoking. And if the military still remained genuinely concerned about the mere possibility of the appearance of approval, it could easily place a sign above the materials stating that "The Military Disapproves The Sale Of All Sexually Explicit Material Depicting Nudity In A Lascivious Way." [10]

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[10] The majority also points to the military's interest as an employer in "disassociating itself from sexually explicit material," ante at ——. While I do not doubt that an employer, including the

The majority's concern that "if sparseness of legislative history were a basis for invalidation of acts of Congress, a wide swath of legislation could fall before the judicial axe," ante at ——, is overstated. Clearly, lack of legislative history is not a basis on which to strike down an Act of Congress. In the first place the purpose of many legislative enactments and the manner in which the legislation furthers the purpose are obvious from their text. Furthermore, not every Act of Congress trammels on constitutional rights. When a legislature interferes with constitutional rights, however, it is neither unreasonable nor contrary to authority to require some sort of legislative determination that the infringement of the constitutional right was necessary to further the government interest advanced. *See, e.g., Sable Communications,* 492 U.S. at 129-30 (holding that a ban on indecent telephone messages violated the First Amendment, and noting that "aside form conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, . . . the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations might prove to be"); *Reno v. ACLU,* 1997 U.S. LEXIS 4037, at *24 n.24 (Jun. 26, 1997) (holding that the "indecent transmission" and "patently offensive display" provisions of the Communications Decency Act of 1996 violated the First Amendment, the Court pointed to the fact that "[n]o hearings were held on the provisions that became law."). *Cf. Giano v. Senkowski,* 54 F.3d 1050, 1058-62 (2d Cir. 1995) (Calabresi, J., dissenting).

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government, could prohibit the display of sexually explicit material in a working environment so pervaded with discriminatory harassment as to alter the conditions of employment and create an abusive working environment, *see Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67 (1986), the government did not come forward with any evidence that the military constitutes a hostile environment, and, even if it did, the Act does nothing to prohibit the display of such material.

In this case, the government simply advances post-hoc rationalizations which find no support in Congressional history or military consideration. To rely on the mere fact that a statute has been enacted as evidence of congressional judgment on the issue addressed in the Act, and assert that a court should give deference to that judgment because it involves a matter of military concern, would mean that no regulation in the military context that infringes on constitutional rights would ever be struck down. Enactment of the legislation would be sufficient by itself to support its validity. If this is "deference to congressional choice," *Rostker*, 453 U.S. at 67, then we have failed to heed the Supreme Court's warning that "deference does not mean abdication," *id.* at 70, and have failed to fulfill "our ultimate responsibility to decide the constitutional question," *id.* at 67, and to protect the liberties which our Constitution guarantees. I, therefore, respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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96 CV 7525 (SAS)

GENERAL MEDIA COMMUNICATIONS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., and VIDEO SOFTWARE DEALER ASSOCIATION,
Plaintiffs,

- v. -

WILLIAM J. PERRY,
in his official capacity as the Secretary of Defense,
and the DEPARTMENT OF DEFENSE,
Defendants.

AMENDED OPINION AND ORDER

Shira A. Scheindlin, U.S.D.J.:

Plaintiffs bring this action to obtain an Order from this Court declaring the Military Honor and Decency Act of 1996, 10 U.S.C. § 2489a (the "Act"), unconstitutional and enjoining defendants from enforcing its terms. For the reasons set forth below, I find the Act violates the First and Fifth Amendments. Accordingly, plaintiffs' request for injunctive relief is granted.

I. INTRODUCTION

Contrary to the arguments of the parties, this case is not about sex or core values. It is a case about pornog-

raphy, and whether the Constitution protects plaintiffs' right to distribute it in military exchanges.[1] Whether one likes or approves of pornography, however, is not the issue. In a diverse and democratic society, we tolerate a vast range of discourse, much of it in bad taste and offensive. Our historical decision to elevate the right of free speech above often valid and competing interests has, at times, come at a high price to our communal values and culture. Permitting hatemongers to march in Skokie or to burn crosses in St. Paul surely is not behavior of which the vast majority of Americans approves. Similarly, public flag burning, pornographic movies, or nude dancing are activities that do not reflect the dominant cultural values in American society. Yet these activities are among those that have enjoyed some measure of constitutional protection.[2]

The dilemma we face when the right to free speech conflicts with the equally compelling wish to silence those who demean others with sexist, racist, and otherwise outrageous speech is often a stark one . When balancing these two interests, however, the former must prevail. While the majority of Americans may wish to ban pornography, in the final analysis, society is better served by protecting our cherished right to free speech, even at the cost of tolerating speech that is outrageous, offensive, and de-

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[1] "Pornography" has been defined as "a depiction of licentiousness or lewdness" and "a portrayal of erotic behavior designed to cause sexual excitement". Webster's Third New International Dictionary 1767 (1993). The Military Honor and Decency Act bans the sale or rental of "lascivious" portrayals of nudity, which implementing regulations define as those that are "lewd" and "intended or designed to elicit a sexual response."

[2] *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (hate-mongers); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (cross burning); *Hustler Magazine v. Falwell*, 483 U.S. 1018 (1987) (advertisement parody of religious figure); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981) (pornographic movies); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (nude dancing).

meaning. There is no question that the result of permitting such speech is often unfortunate and unpleasant. But our Constitution has effectively protected us for over two centuries from living in a society where the government intrudes on our individual rights by deciding what consenting adults can read or view. As Judge Learned Hand once eloquently expressed, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). In the context of our long and rich First Amendment tradition, it becomes clear that sexually explicit material cannot be banned from sale or rental at military exchanges merely because it is offensive.

II. FACTUAL AND PROCEDURAL BACKGROUND

Title 10 of the United States Code, Section 2489a, originally titled the "Military Honor and Decency Act of 1996," was added to the National Defense Authorization Act For Fiscal Year 1997 (Pub. L. 104-201) without debate on May 1, 1996. Signed by President Clinton on September 23, 1996, the Act became effective on December 22, 1996, and provides in pertinent part:

> Sec. 2489a. . . . (a) PROHIBITION OF SALE OR RENTAL.—The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.
>
> (b) PROHIBITION OF OFFICIALLY PROVIDED SEXUALLY EXPLICIT MATERIAL.—A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person.

> (c) REGULATIONS.—The Secretary of Defense shall prescribe regulations to implement this section.
>
> (d) DEFINITIONS.—In this section: (1) The term 'sexually explicit material' means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

10 U.S.C. § 2489a. Pursuant to Section 2489a(c), defendants issued implementing regulations that also became effective on December 22, 1996. *See* Declaration of Daniel S. Alter, Assistant U.S. Attorney, dated December 9, 1996 ("Alter Dec."), Ex. A. at 2. These regulations define "lascivious" to mean "[l]ewd and intended or designed to elicit a sexual response." *Id.*

The Act only bans the sale or rental of "sexually explicit" material on military property. It does not restrict the possession of such material on military property. Additionally, military personnel are free to buy "sexually explicit" material off military property or to order it through the mail. Military personnel may also share the same material with their colleagues so long as they do not sell or rent it.[3]

Plaintiff General Media Communications publishes various periodicals including *Penthouse*. The other plaintiffs

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[3] Some House members, however, appear to disapprove of the presence of this material on military bases altogether. One of its sponsors, Representative Robert Dornan, believes *Penthouse* and like materials are "a frontal, direct, vicious specific assault upon women . . . . cheapening [them] down like slavery to a product, meat on a rack." *See* 142 Cong. Rec. H8824 (July 24, 1996). Representative Dornan has stated that the Act "helps the Navy to tell these guys, stop putting these graphic, gynecological exam shots up on the walls of the carrier hanger deck. Stop that. . . . [The Act] helps commanders to take that, not puritanical, but strong, manly, decent line, or if it is a female officer, an ethically womanly line, to not have this garbage up." *Id.*

are various trade associations whose members are engaged in the wholesale and retail distribution, sale and manufacture of periodicals, books, sound recordings and home videos throughout the nation. Plaintiffs allege that the Act infringes their rights to free speech and equal protection of the laws, in violation of the First and Fourteenth Amendments, respectively. In addition, they allege that the Act is unconstitutionally vague in violation of the Fifth Amendment.

Penthouse is the third most popular magazine sold by Army and Air Force Exchanges, with sales of approximateyl 19,000 copies per month.[4] *See* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction ("Plaintiffs' Memo") at 4. The January 1997 issue of *Penthouse* is 222 pages. The magazine contains a number of articles by prominent authors such as Ben Stein and Alan Dershowitz. More than 97 pages include pictures of women, many of whom are totally nude. A substantial number of these pictures reveal female genitalia and women engaged in sexual contact with other women. There can be no dispute that these depictions of women are designed to elicit a sexual response. It also is fair to say that many of these pictures offend commonly shared ideals of decency because of their explicit nature.[5]

On October 18, 1996, plaintiffs filed an Amended Complaint seeking injunctive and declaratory relief from the Act pursuant to 28 U.S.C. §§ 1331 and 2201. On December 20, 1996, this Court issued a Temporary Restrain-

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[4] By comparison, *amici curiae* Playboy Enterprises, Inc. et al. ("Amici") sell an average of over 25,000 copies per month of *Playboy* magazine in *all* military exchanges. Amici also state that they distributed almost 20,000 videotapes through the exchange system in the first eight months of 1996. *See* Brief of *Amici curiae* in Support of Motion for Preliminary Injunction at 5.

[5] At least one issue of *Penthouse* has been held to be legally obscene. *See Penthouse Int'l Ltd. v. McAuliffe*, 610 F.2d 1353, 1372-73 (5th Cir.) (finding that the January 1978 issue of *Penthouse* was legally obscene), *cert. dismissed*, 447 U.S. 931 (1980).

ing Order enjoining defendants from enforcing the Act until decision of plaintiffs' motion. Oral argument was heard on December 31, 1996. On January 13, 1997, the parties agreed to treat plaintiffs' motion for a preliminary injunction as one for a permanent injunction.

III. DISCUSSION

A. *Legal Standard for Granting Permanent Injunctive Relief*

To succeed in an action for permanent injunctive relief, plaintiffs must establish (1) success on the merits of their claims; (2) irreparable harm absent injunctive relief; (3) that the threatened injury to plaintiffs outweighs any harm the injunction may cause to defendants; and (4) that the injunction is not adverse to the public interest. *See E.E.O.C. v. Local 40, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 76 F.3d 76, 80 (2d Cir. 1996) (citing *Roberts v. Madigan*, 702 F. Supp. 1505, 1514 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992)).

Provided that plaintiffs succeed on the merits of their claims, plaintiffs easily meet the remaining three elements of this test. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996). Generally, "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary." 11A Charles A. Wright, Arthur R. Miller and Mary Kane, Federal Practice and Procedure § 2948.1 at 161 (2d ed. 1995). The defendants cannot claim they will be harmed by an injunction if the Act is unconstitutional, or that the enforcement of an unconstitutional statute best serves the public interest. Thus, if plaintiffs succeed on the merits of their claims, they are entitled to permanent injunctive relief.

B. *The First Amendment*

It is well established that the government may restrict *obscene* speech and expressive conduct. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 (1992); *Miller v. California,* 413 U.S. 15, 24 (1973).[6] The government concedes, however, that the terms of the Act extend beyond obscene material. *See* Transcript of Oral Argument ("Tr.") at 33. This case, therefore, presents the question of whether Congress may restrict the sale or rental of *nonobscene* speech in a military exchange on the ground that it is "lascivious", which is defined by the implementing regulations to mean "lewd and intended or designed to elicit a sexual response."

1. Visual Images are "Speech" for First Amendment Purposes

Visual images are among the myriad forms of expressive conduct shielded by the First Amendment. *See Bery,* 97 F.3d at 695 ("As the Supreme Court has reminded us, visual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind.' *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 632 (1943). . . . One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that

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[6] *Miller* defined the test for determining whether material is obscene:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin,* [408 U.S. 229, 230 (1972)], quoting *Roth v. United States,* [354 U.S. 476, 489 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. at 24.

was is not heroic."). Visual images are not stripped of First Amendment protection because they express sexual messages and ideas. *See Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). And although the government may proscribe obscenity, even this kind of speech is not entirely invisible to the First Amendment. *See R.A.V.*, 505 U.S. at 383 (citing *Roth v. United States*, 354 U.S. 476 (1957)). Obscene materials, for example, may not be restricted on the basis of particulary unpopular viewpoints, ideas or perspectives. *See id.* at 388.

2. Speech May Not Be Restricted Simply Because It Offends

"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing, *inter alia, Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 72 (1983) *Carey v. Brown*, 447 U.S. 455, 462-463 (1980); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745-746 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970)). Restrictions on nonobscene speech based on offensiveness alone are repugnant to the First Amendment for at least two fundamental reasons. First, there is no constitutionally acceptable way to distinguish offensive speech from inoffensive speech: "[O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and

style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971) (offensive speech such as a jacket bearing the words "Fuck the Draft" is protected by the First Amendment). Second, banning nonobscene offensive speech restricts protected expression based on the message it conveys. "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court held that visual depictions of nudity at a drive-in may not be banned on the ground that they might offend passersby. *Erznoznik* involved a city ordinance that criminalized the exhibition of nonobscene visual depictions of "human male or female bare buttocks, human female bare breasts, or human bare pubic areas" if such depictions were "visible from any public street or public place." *Id.* at 207. In ruling that the ordinance violated the First Amendment, the Supreme Court stated:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

Id. at 209 (citations omitted). Thus, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by avert-

ing [his] eyes.' " *Id.* at 210-11 (citations omitted).[7] *Erznoznik* directly contradicts the government's assertion that nonobscene sexual expression may be restricted on the basis of offensiveness. If the government may not ban the public display of nonobscene speech on the ground that it is offensive, it stands to reason that the government may not ban the sale or rental of the same material on similar grounds.[8]

3. The Act Restricts Only Offensive Portrayals of Nudity

By its terms, the Act only proscribes the sale and rental of material that depicts nudity "in a lascivious way". 10 U.S.C. § 2489a(d). As noted above, the implementing regulations define "lascivious" depictions of nudity as those that are "lewd" and "designed or intended to elicit a sexual response." Alter Dec., Ex. A. at 2. In its motion papers and at oral argument, the government asserted that

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[7] The Supreme Court distinguished *Erznoznik* in *Pacifica* on the basis that the offensive material at issue in *Pacifica* intruded into the privacy of the home, whereas the offensive material in *Erznoznik* was displayed in public. "Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away." *Pacifica*, 438 U.S. at 749, n.27. The *Erznoznik* Court rejected *Pacifica*'s other rationale—the potential, indiscriminate exposure of children to offensive material—because a ban on the public display of *all* nudity, as opposed to the public display of sexually explicit nudity, was overbroad. *See Erznoznik*, 422 U.S. at 213. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Again, the context of public display in *Erznoznik* differed from that in *Pacifica*, where the Court expressed support for " 'parents' claim to authority in their own household.' " 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. at 639-640).

[8] The public display of offensive material offends unwilling viewers or listeners. The sale or rental of such material clearly applies to those who choose to view it.

"lewd" means "patently offensive," as used in the first prong of the *Miller* three-part test for obscenity.[9] *See* Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Govt. Memo") at 30; Tr. at 60-61. *See also Miller*, 413 U.S. at 25. Taken together, the statute and its implementing regulations prohibit the sale or rental on military property of material, the dominant theme of which may be deemed "patently offensive," if that material is presented in an audio recording, film or video recording, or a periodical with visual depictions. The Act does not apply to material containing portrayals of nudity that are not "lewd", and thus material that is not "patently offensive" may be sold or rented on military property.

4. The Government's Arguments in Defense of the Act

In an attempt to evade the principle that nonobscene speech cannot be restricted simply because its content is offensive, the government relies on two sets of Supreme Court decisions that have upheld restrictions on such speech in limited circumstances. These restrictions are confined to the context of indiscriminate public exposure, first in the broadcast media and second in schools. In *Pacifica*, the Court held the F.C.C. could regulate nonobscene but indecent and patently offensive radio broadcasts because of the special difficulties posed by the broadcasting medium. In particular, the Court observed that broadcast speech is "uniquely pervasive", can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." *See Pacifica*, 438 U.S. at 748-

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[9] *See* footnote 6, *supra*. The word "lewd" is commonly used to mean "vulgar", "lascivious", "indecent", or "salacious". *See Webster's Third New International Dictionary* 1303 (1993). For the purposes of this Opinion, however, I will accept the government's definition of "lewd".

49. *Pacifica* was expressly limited to the narrow context of broadcasting by *Sable Communications*, 492 U.S. at 127 (federal ban on indecent telephone messages violated the First Amendment). This rationale does not apply to military exchanges any more than it applies to a corner drug store.[10]

The government also relies on *Board of Education v. Pico*, 457 U.S. 853, 871 (1982), in which the Court held that a school board's decision to remove nonobscene books from the school library was constitutional only because it was based on the school board's judgment that such books interfered with the educational mission of the school. *Pico* expressly recognized, however, that if the school board "*intended* by their removal decision to deny respondents access to ideas with which [the school board] disagreed, and if this intent was the decisive factor in [the school board's] decision, then [they] have exercised their discretion in violation of the Constitution." *Id.* (italics in original). The government also cites *Bethel School District v. Fraser*, 478 U.S. 675 (1986), to support its defense of the Act. But again, *Fraser* permitted the regulation of nonobscene sexually explicit and offensive speech within the context of a school environment where the audience included young children. *Id.* at 685. Both *Fraser* and *Pico* apply only to the school environment, where it has been long recognized that First Amendment freedoms are not equal to those of adults in other settings. *See, e.g., Thomas v. Board of Educ., Granville Central School Dist.*,

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[10] Moreover, military exchanges world-wide cover the front panel of *Penthouse* and similar magazines when they are displayed for sale. This procedure was specifically designed to prevent children from being exposed to potentially offensive magazine covers. *See* Alter Dec., Ex. C at 10-2 (military directive on "Selection, Display and Selling of Adult-Oriented Materials). Thus, when sold at a military exchange, *Penthouse* does not intrude on the privacy of the home without prior warning, and is not displayed to young children.

607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) ("the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket"), *cert. denied*, 444 U.S. 1081 (1980).

Outside the narrow contexts of broadcast media and the school environment, the Supreme Court has never allowed the government to restrict nonobscene speech because it is "indecent", "vulgar" or "offensive". Quite to the contrary, the Supreme Court has recognized that such speech is protected by the First Amendment because it may communicate messages, ideas and perspectives that cannot be expressed otherwise. *See, e.g., Cohen*, 403 U.S. at 26 ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive intent of individual speech, has little or no regard for that emotive function, which, practically speaking, may often be the more important element of the overall message sought to be [communicated].").[11]

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[11] During oral argument, the government also relied on *R.A.V.* in support of its claim that Congress may restrict speech because it is offensive. This argument was framed in the context of viewpoint-based speech restrictions, which target not merely subject matter but particular views taken by speakers on that subject matter. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516 (1995). *See generally* Kent Greenawalt, *Viewpoints from Olympus*, 96 Colum. L. Rev. 697, 700 (1996) (distinguishing viewpoint discrimination from content discrimination)). The government argued that "[in *R.A.V.*] the Supreme Court said you could regulate obscenity according to degree of lasciviousness. Perforce, lasciviousness cannot be a viewpoint." Thus, the government asserted, it follows from *R.A.V.* that even nonobscene material may be proscribed on the basis of lasciviousness.

The government's interpretation of *R.A.V.* is simply wrong. By its own admission, the government acknowledges that *R.A.V.* applies to the very different category of obscene speech, which, as a category, is excluded from First Amendment protection. *See R.A.V.*, 505 U.S. at 388. Hence because the state may entirely ban obscenity, "no significant danger of idea or viewpoint discrimination

5. The Act Violates the First Amendment

Restrictions of protected speech are subject to different levels of judicial scrutiny depending on the kind of government property to which they are applied. Government-owned property has been divided into three categories for purposes of First Amendment analysis:

> (1) *traditional public forums*, which 'by long tradition or by government fiat have been devoted to assembly and debate,' *Perry Education Ass'n v. Perry Local Educators' Ass'n*, [460 U.S. 37, 45 (1983)], including such areas as public streets, parks and sidewalks; (2) *public forums by government designation* that are state-created and opened for limited public use, for example, university meeting facilities and municipal theatres; and (3) *nonpublic forums* which, by tradition or design, are not appropriate platforms for unrestrained communication—military installations and federal workplaces, for instance, fall into this category. *Id.*

Paulsen v. County of Nassau, 925 F.2d 65, 68-69 (2d Cir. 1991). In either category of public forum, content-based government restrictions on speech are subjected to strict scrutiny and must be shown to effectuate a compelling state interest with the least restrictive available means. *See Perry Educ. Ass'n*, 460 U.S. at 46. In nonpublic fora, however, content-based restrictions are held to a less strict reasonableness standard, and "[i]t is sufficient that rules reflect a legitimate government concern and do not suppress expression merely because public officials oppose the speaker's view." *Paulsen*, 925 F.2d at 69 (citing *Perry Educ. Ass'n*, 460 U.S. at 46).

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exists . . . if [the] State . . . choose[s] to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity." *Id.* This rationale does not apply to offensive, nonobscene material, which the state cannot ban in the first instance.

I need not determine whether military exchanges are public or nonpublic fora. Even in a nonpublic forum, statutory restrictions on nonobscene speech must be based on a legitimate government interest. Because the purpose of the Act is to ban expression that is lewd—under the government's plain meaning interpretation of the Act, expression that is "patently offensive"—and because the First Amendment prevents the government from banning material solely because it is offensive, the Act is unconstitutional whether a military exchange is a public or nonpublic forum.[12]

The government argues that the Act is intended to maintain the "appearance of honor and propriety and professionalism which the military seeks to establish in the community, and in the country and in the world at large." Tr. at 38. The government also contends the Act is based on Congress' determination that the sale or rental of sexually explicit materials "jeopardized the military mission of promoting core values" such as "honor, courage and commitment". Govt. Memo at 17-18. By removing *Penthouse* and like material from the military exchanges, the government asserts, military personnel will be more likely to "exemplify the ultimate in ethical and moral behavior." *Id.* at 18.

The determination of the Act's purpose must begin, of course, with the language of the Act itself. Only when a court is faced with unavoidably ambiguous statutory wording should it look behind the words themselves to legislative history in an attempt to reconstruct their purpose. *See United States v. R.L.C.*, 503 U.S. 291, 298 (1992); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 35-96 (1951) (Jackson, J., concurring). As discussed above, a plain reading of the Act shows that it

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[12] The Act is a content-based speech restriction that would be subject to strict scrutiny in either type of public forum, but would be held to the less strict reasonableness standard in a nonpublic forum. *See Rosenberger*, 115 S. Ct. at 2517.

proscribes only those portrayals of nudity that are "lascivious". The term "lascivious" in turn is claimed to mean "patently offensive". Thus, the Act on its face bans protected speech on the basis of its offensiveness alone.

The government asserts that a plain meaning interpretation of the Act leads to the conclusion that the statute's purpose is to promote military core values and improve the public perception of the military. Arguing that magazines such as *Penthouse* are "unpalatable to many", the government contends that its sale and rental in military exchanges might be interpreted as an official endorsement of the material published therein. *See* Govt. Memo at 18 (both military personnel and the public at large might reasonably believe that sexually explicit vulgarity sold at the base exchange bears the commander's formal blessings"). This argument is unpersuasive for several reasons. First, the Act does nothing whatsoever to reduce the actual presence of sexually explicit material on military property and there is no evidence to show that the actual sale or rental of sexually explicit material—as opposed to its possession—causes the alleged harm to the military's core values and appearance to the civilian world. Second, unless supported by Congressional findings of fact, it is unreasonable to equate the sale or rental of sexually explicit material in military exchanges with an official "endorsement". Military exchanges sell those products that are popularly demanded by military personnel, even products that may be harmful to those who buy them. It is common knowledge, for example, that alcohol and cigarettes are available in most military exchanges.

Rather, a plain reading of the Act leads inevitably to the conclusion that it was drafted in an attempt to limit the sale and rental of nonobscene speech that Congress believed to be offensive and to penalize those who publish it by preventing its sale to military exchanges. I have no quarrel with the observation that these materials are offensive—in fact, I agree that they are. But, as noted

earlier, "[one person's] vulgarity is another's lyric." *Cohen*, 403 U.S. at 25. As the cases cited above in Section III(C) clearly establish, our Constitutional tradition does not allow Congress to restrict protected speech because it finds the ideas, messages or perspectives expressed therein to be offensive, vulgar or indecent. I therefore find the Act violates the First Amendment.

C. *The Equal Protection Clause*

Statutory classifications that burden a First Amendment right face strict scrutiny under the Equal Protection clause of the Fourteenth Amendment.[13] *See Mosley*, 408 U.S. at 96 ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). *See also Carey*, 447 U.S. at 461-462; *Bery*, 97 F.3d at 699. Under equal protection strict scrutiny analysis, such a statutory classification is unconstitutional unless the government can prove that it is necessary to promote a compelling government interest. *See Romer v. Evans*, 116 S.Ct. 1620, 1627 (1996) (citing *Heller v. Doe*, 509 U.S. 312 (1993)). *See also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (citing, *inter alia*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). Furthermore, the government must show that the statutory classification furthers that compelling interest with the least restrictive means available. *See Bernal v. Fainter*, 467 U.S. 216,

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[13] The Fourteenth Amendment does not apply to the federal government. However, the Supreme Court has long recognized that discriminatory classifications by the federal government may violate the Due Process clause of the Fifth Amendment. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (federal law allowing only male members of armed forces automatic dependency allowance violates Fifth Amendment Due Process clause); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools violates Fifth Amendment Due Process clause).

219 & n.6 (1984) (also noting that "[o]nly rarely are statutes sustained in the face of strict scrutiny.").

While the Supreme Court has afforded Congress great deference in the area of military affairs, it is also true that Congress does not operate free of all constitutional restraint when legislating in this area. *See Rostker v. Goldberg*, 453 U.S. 57, 64-65, 67 (1981). Citizens do not jettison their Constitutional rights simply by enlisting in the armed forces, and restrictions on the First Amendment rights of military personnel are subject to strict scrutiny. *See Thomas v. Board of Educ.*, 607 F.2d at 1049 (even in the military context, "the Constitution requires governmental authorities to permit the maximum degree of unrestrained expression consistent with the maintenance of institutional integrity"). Thus, the Supreme Court has allowed restrictions of First Amendment rights in the military context only when such restrictions were deemed necessary to thwart "a clear danger to military loyalty, discipline or morale". *Brown v. Glines*, 444 U.S. 348, 355 (1980). *See also Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding military requirement of a uniform dress code as essential aspect of military discipline); *United States v. Albertini*, 472 U.S. 675 (1985) (upholding regulation that authorized commanders to permanently exclude from military base civilians who had vandalized military property as threat to preparedness and security); *Greer v. Spock*, 424 U.S. 828, 840 (1976); *Parker v. Levy*, 417 U.S. 733 (1974) (upholding conviction of a commissioned officer for conduct unbecoming an officer where, while in uniform, he publicly urged enlisted personnel to resist orders and protest the Vietnam War). *Cf. Flower v. United States*, 407 U.S. 197 (1972) (reversing conviction for unauthorized reentry upon military reservation where defendant had been ordered off reservation for distributing leaflets). Under the Equal Protection clause, a statutory classification that burdens a soldier's rights of free expression must face the same strict scrutiny test as

any other classification that impinges upon a fundamental right. *See, e.g., Rostker,* 453 U.S. at 71 (classifications face same test in military context as elsewhere, although courts should defer to "congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance").

The Act creates classifications by banning the sale or rental of sexually explicit material that is presented in audio tapes, periodicals, and films but not sexually explicit material that is presented in books. Thus, the Act distinguishes between the nude photographs in *Penthouse* and those in Madonna's book entitled *Sex* simply because one is a periodical and the other is a hard-cover publication. Furthermore, the Act distinguishes between written and visual forms of expression, and proscribes only the latter. For example, the sale or rental of erotic literature would not be banned as long as it contained no visual images. By treating one form of publishing ideas differently than another, the Act invites strict scrutiny. *See, e.g., Bery,* 97 F.3d at 696, 699 (ordinance that distinguished between written and visual expression in a manner that effectively banned only one created a classification that required strict scrutiny under the Equal Protection clause).

Even were I to accept the government's claims with regard to the Act's purpose, which I do not for reasons explained above, the Act could not withstand strict scrutiny. There are no Congressional findings of fact and no evidence on the record before the Court that suggests the Act's classification is necessary to achieve Congress' alleged goals of maintaining "the appearance of honor, propriety and professionalism" and "promoting core values". Given the tremendous popularity of *Penthouse* and *Playboy* among military personnel, nothing indicates that the Act will reduce the presence of sexually explicit material on military property. Common sense indicates that publishers could evade the Act simply by selling hard-cover "books" instead of "periodicals" without changing the ma-

terial published therein. Moreover, the government has presented no facts to indicate that visual versus written erotica furthers the government's asserted purpose for passing the Act. Because the Act's classifications do not further a permissible, let alone compelling state interest, and because the means the government has chosen to further that interest are not narrowly tailored, the Act violates the Equal Protection Clause.

D. *Vagueness*

Plaintiffs also claim the Act is vague in violation of the Due Process clause of the Fifth Amendment.[14] The standards for evaluating statutory vagueness were set forth in *Grayned v. City of Rockford*:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

408 U.S. at 108-109. The Supreme Court has also stated that these standards should not be mechanically applied. Thus, "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Villages of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). For example enactments with civil rather than criminal penalties

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[14] At least one commentator has argued that the First Amendment vagueness doctrine is distinct from the Fifth Amendment vagueness doctrine, and should be understood as a subpart of the First Amendment overbreadth doctrine. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 903 (1991).

are given more leeway because the consequences of imprecision are less severe. *See id.* at 498-499. However, *Hoffman* also expressly stated that "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or association, a more stringent vagueness test should apply." *Id.* at 499 (citing *Papacristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972) (vagrancy ordinance is void for vagueness because it encourages erratic and arbitrary arrests and places almost unfettered discretion in hands of the police) and *Grayned,* 409 U.S. at 109).

As discussed above in Section III(C), government restrictions on offensive speech are inherently problematic because of the difficulty in distinguishing offensive from inoffensive speech in an objective manner. *See Cohen,* 403 U.S. at 25. In the instant case, the government has conceded that the term "lascivious" as it is used by the Act contains a subjective element. Tr. at 32-33. In this nation's pluralistic society, tastes and standards relating to the portrayal of nudity vary greatly from person to person. What one person may find to be a "lascivious" portrayal of nudity may be inspiring art to another. *See American Civil Liberties Union v. Reno,* 929 F. Supp. 824, 856 (E.D. Pa. 1996) (terms "indecent" and "patently offensive" as used by the Communications Decency Act of 1996 are "inherently vague"). *But see Shea ex rel. American Reporter v. Reno,* 930 F. Supp. 916, 935 (S.D. N.Y. 1996) (finding terms of Communications Decency Act codified the FCC definition of indecency and thus were not void for vagueness), *petition for cert. filed,* 65 U.S.L.W. 3323 (Oct. 15, 1996) (No. 96-595). The "Review Board" established by the Act's implementing regulations [16] does not cure this defect, for there is no reason

[16] The regulations direct the defendants to establish a Resale Activities Board of Review ("Review Board"), which is to include a

to believe that military officers will be more adept at identifying exactly what constitutes a "lewd" portrayal of nudity than any other government official.

By allowing the scope of the Act's ban on the sale or rental of portrayals of nudity to change according to each government official's distinction between what is "patently offensive" and what is not, Congress has created the real danger of *ad hoc*, arbitrary interpretation and application of the law. Worse yet, Congress has given military officials the means to ban the sale or rental of disfavored speech and expressive conduct under the pretext that it is "patently offensive" in their judgment. *See, e.g., NAACP v. Button*, 371 U.S. 415, 435 (1963) ("[A] vague and broad statute lends itself to selective enforcement against unpopular causes.").

This risk impermissibly chills plaintiffs' First Amendment rights. It is true that plaintiffs cannot be directly penalized under the Act because its effect is only to prevent military personnel from stocking their products. However, plaintiffs have a significant financial stake in their current access to shelf space in military exchanges.[16] If they are subject to a statutory prohibition of the sale or rental of "lascivious" portrayals of nudity, plaintiffs may well feel obliged to scale back their expressive conduct beyond constitutionally protected boundaries in order to maintain that access. Thus, irrespective of whether plaintiffs face the risk of direct punishment under the Act,

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senior representative from each of the military branches' exchange services. The Review Board has the authority and responsibility to periodically review material offered for sale or rental to determine whether such material is sexually explicit within the terms of the Act and implementing regulations. *See* Alter Dec., Ex. A at 3.

[16] For example, *amici* assert that *Playboy*'s military exchange sales represent approximately 2.7% of the magazine's total newsstand sales of its regular issues, and 3.6% of the magazine's total newsstand sales of its special editions. *See* Brief of *Amici curiae*, at 5.

the vagueness of its terms trespasses on plaintiffs' First Amendment rights.

IV. CONCLUSION

I am not unmindful that *Penthouse* and its ilk are offensive to many Americans' sense of decency. I am also aware of the military's recent difficulties involving incidents of sexual harassment and acts of violence against women. Yet if Congress wishes to restrict the sale or rental of expressive materials on military property, it must do so in a constitutionally acceptable manner. For example, Congress may choose to eliminate the sale and rental of all expressive material or all obscene material. For the foregoing reasons, I find the Act violates the First and Fifth Amendments. Accordingly, plaintiffs' request for permanent injunctive relief is granted, and it is hereby

ORDERED that, as of the date of this Opinion and Order, defendants, including their agents, servants, and employees (both military and civilian) shall be permanently restrained from changing, as a result of the Act, their existing stock, display and selling policies or practices with respect to materials that may be deemed subject to the Act.

So Ordered:

/s/ Shira A. Scheindlin
SHIRA A. SCHEINDLIN
U.S.D.J.

Dated: New York, New York
January 22, 1997

Amended: February 20, 1997

APPENDIX C

[Filed Feb. 3, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of February, one thousand nine hundred and ninety-eight.

Docket No. 97-6029

GENERAL MEDIA COMMUNICATIONS, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., and VIDEO SOFTWARE DEALERS ASSOCIATION,

Plaintiffs-Appellees,

v.

WILLIAM S. COHEN,
in his official capacity as Secretary of Defense,
and the DEPARTMENT OF DEFENSE,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be *reheard in banc* having been filed herein by the Plaintiffs-Appellees *General Media Communications, et al.*, and the panel that heard the appeal having filed an opinion on November 21, 1997,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 97-6029

GENERAL MEDIA COMMUNICATIONS, INC., *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM S. COHEN, *et ano.*,
Defendant-Appellant.

NOTICE OF MOTION FOR STAY OF MANDATE
PENDING PETITION FOR CERTIORARI

Plaintiffs request that an order be entered staying the issuance of the Second Circuit's mandate for 30 days and if a petition for Certiorari is filed during such period, until final disposition by the United States Supreme Court.

/s/ Michael A. Bamberger
MICHAEL A. BAMBERGER

Date February 6, 1998

ORDER

Before: Hon. Ralph K. Winter, Chief Judge, Hon. José A. Cabranes, Hon. Fred L. Parker, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

Date 2/13/98

FOR THE COURT:

GEORGE LANGE III
Clerk

By: /s/ Lucille Carr
LUCILLE CARR
Deputy Clerk

APPENDIX E

STATUTE INVOLVED

Section 343 of the National Defense Authorization Act for Fiscal Year 1997 (P.L. 104-201) provides:

Sec. 343. Prohibition of Sale or Rental of Sexually Explicit Material.

(a) In General (1) Chapter 147 of title 10, United States Code, is amended by inserting after section 2489 the following new section: "2489a. Sale or rental of sexually explicit material prohibited

"(a) Prohibition of Sale or Rental. The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.

"(b) Prohibition of Officially Provided Sexually Explicit Material. A member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person.

"(c) Regulations. The Secretary of Defense shall prescribe regulations to implement this section.

"(d) Definitions. In this section:

"(1) The term sexually explicit material means an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

"(2) The term property under the jurisdiction of the Department of Defense includes commissaries, all facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Navy

Resale and Services Support Office, Marine Corps exchanges, and ships stores.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2489 the following new item:

"2489a. Sale or rental of sexually explicit material prohibited.".

(b) Effective Date. Subsection (a) of section 2489a of title 10, United States Code, as added by subsection (a) of this section, shall take effect 90 days after the date of the enactment of this Act.

APPENDIX F

[DoD Logo]

Force Management
Policy

ASSISTANT SECRETARY OF DEFENSE
4000 Defense Pentagon
Washington, D.C. 20301-4000

December xx, 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE SECRETARY OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT:

DoD Directive-Type Memorandum—Sale or Rental of Sexually Explicit Material on DoD Property

Reference:

(a) DoD Directive 5025.1-M, "DoD Directives System Procedures", August 15, 1994

(b) Secretary of Defense Memorandum, Subject: Delegation of Authorities, November 14, 1996

(c) Under Secretary of Defense (Personnel and Readiness) Memorandum, Subject: Delegation of Authority and Assignment of Duties, December 6, 1996

(d) Public Law 104-201, section 343 (to be codified at Title 10, United States Code, Section 2489a)

(e) DoD Directive 1330.9, "Armed Services Exchange Regulations," December 15, 1986

A. PURPOSE

Pursuant to references (a), (b) and (c), this one-time Directive-Type Memorandum implements reference (d), consistent with reference (e), by providing guidance concerning restrictions on the sale or rental of sexually explicit materials on property under the jurisdiction of the Department of Defense (DoD) or by members of the armed forces or DoD civilian officers or employees, acting in their official capacities.

B. APPLICABILITY

1. This Memorandum applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is operating as a service in the Navy), the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the DoD Inspector General, the Defense Agencies, and the DoD Field Activities.

2. This Memorandum shall not confer rights on any person.

C. DEFINITIONS

1. *Material.* An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

2. *Sexually Explicit Material.* Material the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.

3. *Dominant Theme.* A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

4. *Lascivious.* Lewd and intended or designed to elicit a sexual response.

5. *Property Under the Jurisdiction of the Department of Defense.* Commissaries operated by the Defense Commissary Agency, facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Marine Corps exchanges, and U.S. Navy ships' stores (sometimes referred to collectively herein as "retail outlets"), excluding for the purposes of this Memorandum entities that are not instrumentalities of the United States.

D. POLICY

In implementing reference (c), it is DoD policy that:

1. No sexually explicit material may be offered for sale or rental on property under the jurisdiction of DoD, and no member of the armed forces, or DoD civilian officer or employee, acting in his or her official capacity, shall offer for sale or rental any sexually explicit material.

2. Material shall not be deemed sexually explicit because of any message or point of view expressed therein.

E. RESPONSIBILITIES

1. The *Assistant Secretary of Defense for Force Management Policy*, under the Under Secretary of Defense (Personnel and Readiness), shall:

(a) monitor and, as to DoD resale activities under the Assistant Secretary's authority, direction and control assure, compliance with this Memorandum;

(b) establish, and appoint a Chair of, the Resale Activities Board of Review (the "Board"), which shall also include a senior representative from each of the Army and Air Force Exchange Service, the Navy Exchange Service Command, and the Marine Corps exchanges.

2. The *Secretaries of the Military Departments* shall ensure that their respective component DoD resale activities comply with this Memorandum.

3. The *Resale Activities Board of Review* shall have the responsibilities set forth in section F of this Memorandum.

F. PROCEDURES

1. The Board shall have the authority and responsibility to periodically review material offered or to be offered for sale or rental on property under DoD jurisdiction, and to determine whether any such material is sexually explicit in accordance with this Memorandum. Within sixty (60) days of the issuance of this Memorandum, the Board shall undertake and complete an initial review of material that is offered for sale or rental on the date that this Memorandum becomes effective.

2. If the Board determines that any material offered for sale or rental on property under DoD jurisdiction is sexually explicit, such material shall be withdrawn from all retail outlets where it is sold or rented and returned to distributors or suppliers, and shall not be purchased absent further action by the Board.

3. Following its initial review pursuant to subsection F.1., above, the Board shall convene as necessary to determine whether any material offered or to be offered for sale or rental on property under DoD jurisdiction is sexually explicit. The Board members shall, to the extent practicable, maintain and update relevant information

concerning material offered or to be offered for sale or rental on property under DoD jurisdiction.

4. If any purchasing agent or manager of a retail outlet has reason to believe that material offered or to be offered for sale or rental on property under DoD jurisdiction may be sexually explicit as defined herein, and such material is not addressed by the Board's instructions issued pursuant to subsection F.5., below, he or she shall request a determination from the Board concerning such material.

5. At the conclusion of its initial review pursuant to subsection F.1., above, and thereafter from time to time as necessary, the Board shall provide instructions to purchasing agents and managers of retail outlets concerning the withdrawal and return of sexually explicit material. The Board may also provide instructions to purchasing agents and managers of retail outlets concerning material that it has determined is not sexually explicit. Purchasing agents and managers of retail outlets shall continue to follow their usual purchasing and stocking practices unless instructed otherwise by the Board.

G. EFFECTIVE DATE

This Directive-Type Memorandum shall become effective on December 22, 1996.

F. PANG
Assistant Secretary of Defense
(Force Management Policy)